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In the Supreme Court of the United States

OCTOBER TERM, 1975

AMERICAN ALUMINUM CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The *per curiam* order of the court of appeals (Pet. App. 81a) is reported at 522 F.2d 1278. The opinion and order of the Federal Trade Commission (Pet. App. 65a-80a) and the initial decision and order of the administrative law judge (Pet. App. 25a-64a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1975. On January 5, 1976, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to March 13, 1976. The petition was filed on March 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether, in the particular circumstances of this case, involving a prolonged course of unfair and deceptive acts and practices by petitioners in the sale of home improvement products—

1. The Commission properly refused to issue subpoenas in aid of petitioners' effort to show that some of their competitors engaged in similar conduct.

2. The Commission properly included all products sold by petitioners in its order requiring petitioners to cease and desist from engaging in such practices.

STATUTE INVOLVED

Section 5(a) and (b) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(a) and (b),[1] provides in part:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corpations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * * * *
>
> (b) * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall * * * issue and cause to be served

[1]Section 5(a)(1) and (6) has been amended to apply to conduct "affecting" as well as "in" commerce (see 15 U.S.C. (Supp. IV) 45(a)(1) and (6)), but this case is based on the law as it stood prior to the amendment.

> on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

STATEMENT

Petitioners are a closely held corporation engaged in the sale and installation of aluminum siding and other home improvement products and two persons who have been its principal officers and sole stockholders (Pet. App. 27a). In October 1971, the Commission issued a complaint alleging that petitioners had engaged in unfair and deceptive acts and practices in violation of Section 5 (a) of the Federal Trade Commission Act, 15 U.S.C. 45(a), the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and regulations promulgated thereunder (Pet. App. 1a-8a).

Petitioners sought subpoenas *duces tecum* for the asserted purpose of showing that five of their competitors were engaged in the same practices as those alleged by the Commission to be false and misleading (Pet. App. 9a-19a). The administrative law judge denied the motion on the ground that the materials petitioner sought to obtain were irrelevant to the proceeding (Pet. App. 20a-21a).[2]

In October 1973, after the conclusion of hearings, the administrative law judge issued an initial decision in which he determined that petitioners had violated the Federal Trade Commission Act and the Truth in Lending Act by consistently engaging in certain unfair and deceptive acts and practices, such as using "bait and switch" tactics in selling aluminum siding and making misrepresentations concerning "free" gifts, use of a customer's home in advertising, guarantees, and the need for repainting (Pet. App. 25a-55a). Accordingly, the judge issued an order requiring petitioners to cease and

[2]The Commission declined to allow petitioners to take an interlocutory appeal from this ruling (Pet. App. 23a-24a).

desist from such practices with respect to all products they sold or offered for sale (Pet. App. 56a-64a). On appeal, the Commission adopted the opinion and order of the administrative law judge with modifications not here relevant (Pet. App. 65a-80a) and sustained the judge's refusal to issue subpoenas (Pet. App. 75a).

The court of appeals summarily affirmed and enforced the Commission's order (Pet. App. 81a).

ARGUMENT

The decision of the court of appeals is correct, is in accord with the rulings of other courts, and involves only the application of settled principles to particular facts. There is no necessity for further review.

1. Petitioners contend (Pet. 7-13) that the Commission erred in refusing, on grounds of relevance, to issue subpoenas in aid of their effort to establish that some of their competitors were engaging in practices similar to those alleged in the complaint.[3] It is settled, however, that the Commission may properly proceed against one law violator at a time even if many of its competitors may also be in violation of the law. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413; *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251. Furthermore, injury to competitors need not be proven in a case charging deception of the public. *Federal Trade Commission* v. *Algoma Lumber Co.* 291 U.S. 67, 78-79. Accordingly, evidence of such conduct by competitors is ordinarily irrelevant and petitioners have

[3]Although petitioners make passing references to "due process" (Pet. 12), neither their statement of the questions presented nor their listing of the statutory and other provisions involved (Pet. 2-4) indicates a constitutional basis for their claim.

not shown any circumstances justifying an exception to this general principle.[4]

2. Petitioners contend (Pet. 13-18) that the Commission's order exceeded its powers by prohibiting them from engaging in certain unfair or deceptive practices in connection with the sale or offering for sale of "any * * * products" (Pet. App. 66a), rather than being limited to products sold by petitioners in the past.

The Commission, however, has wide discretion in determining the type of order that is necessary to terminate unfair or deceptive trade practices and to protect the public against their repetition, and the remedy selected will be upheld by the courts if it is reasonably related to the unlawful practices found to exist. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392-395; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-431; *Federal Trade Commission*

[4]*Marco Sales Co.* v. *Federal Trade Commission*, 453 F.2d 1 (C.A. 2), on which petitioners rely, is inapposite. The court there objected to the Commission's absolute prohibition, through adjudicatory proceedings, of practices engaged in by one company while at the same time approving, through rule-making, virtually identical practices of other companies. "Obviously," said the court, "the Commission cannot be expected to bring simultaneous proceedings against all of those engaged in identical practices. [*Moog Industries* and *Universal-Rundle Corp.*] would be in point if Marco were urging that others, engaged in identical practices competing with him, were not similarly pursued by the Commission. Petitioners here do not so argue. They argue rather that those engaged in the same activity are regulated while Marco is annihilated. In short, it is not that the Commission has failed to act against others but that it has adopted a positive regulatory approach to them totally inconsistent with its approach toward petitioners." 453 F.2d at 6. See *Ger-Ro-Mar, Inc.* v. *Federal Trade Commission*, 518 F.2d 33, 35 (C.A. 2). Petitioners in this case do not contend that the Commission has sanctioned the allegedly deceptive practices of their competitors, only that it has not yet proceeded against them.

v. *Ruberoid Co.*, 343 U.S. 470, 473; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611-613. Commission orders applicable to "any product" have repeatedly been sustained by this Court (see, *e.g.*, *Federal Trade Commission* v. *Colgate-Palmolive Co.*, *supra*, 380 U.S. at 394-395 ("any product")) and by the courts of appeals.[5]

The question whether such an order in a particular case exceeds the Commission's broad authority thus depends upon the facts of the case. *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392.[6] In view of the findings that petitioners have long engaged in systematic misrepresentations and that "[d]eception is a way of life with these [petitioners], a major part of their stock-in-trade" (Pet. App. 78a), the comprehensive order here was within the Commission's discretion.

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[5]See, *e.g.*, *Tashof* v. *Federal Trade Commission*, 437 F.2d 707, 715 (C.A. D.C.) ("any article of merchandise"); *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F.2d 313, 324 (C.A. 8), certiorari denied, 384 U.S. 939 ("all Benrus products"); *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F.2d 523, 532 (C.A. 4) (all Carter products); *Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F.2d 404, 408 (C.A. 2) ("other merchandise").

[6]Compare, *e.g.*, *American Home Products Corp.* v. *Federal Trade Commission*, 402 F.2d 232, 237 (C.A. 6); *Grove Laboratories* v. *Federal Trade Commission*, 418 F.2d 489, 496-497 (C.A. 5).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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